APPENDIX

I. OPINIONS

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 18, 1977.

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge

SUNDSTRAND CORPORATION,

Plaintiff-Appellee,

Nos. 76-1317, 76-1318

vs.

SUN CHEMICAL CORPORATION, RAYMOND F. RYAN, THOMAS B. HART, JR.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 69 C 1660

Bernard M. Decker, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by appellee Sundstrand Corporation, and on consideration of the answer thereto filed by appellants Sun Chemical Corporation and Huarisa Estate, a majority of the judges of the original panel have voted to deny a rehear-

ing, and a majority of the judges in active service have voted to deny a rehearing *en banc*. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.*

IT IS FURTHER ORDERED that the following be added at the end of the last line of footnote 35 of the slip opinion:

> "Some of these references are to the original transcripts of depositions that were included in the record on appeal without objection. Sundstrand has referred to such materials (Br. 77 and Pet. 10), and other courts of appeals have also referred to deposition transcripts which were in the record on appeal but not in the trial record. *E.g., Lyon* v. *Carey,* 533 F.2d 649, 652 (D.C. Cir. 1976); *Merola* v. *Atlantic Richfield Co.,* 515 F.2d 165, 170 (3d Cir. 1975); see also *Barrett* v. *Baylor,* 457 F.2d 119, 124 n. 2 (7th Cir. 1972)."

Chief Judge Fairchild voted for rehearing by the panel, Judge Bauer voted for rehearing *en banc,* and Judge Tone disqualified himself from consideration of the petition.

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* See *Santa Fe Industries, Inc.* v. *Green,* _____ U.S. _____, _____, 45 LW 4317, 4321; *Piper* v. *Chris-Craft Industries, Inc.,* _____ U.S. _____, _____, 45 LW 4182, 4195 (Blackmun J., concurring).

Footnote 35 of Court of Appeals Opinion, as Amended by Order of May 18, 1977

[The following sentence appears in the opinion of the Court of Appeals at Meers App. 103-104: "Our independent study of the record shows that the principal reason Sundstrand proceeded to purchase the Burke stock on February 6 was because counsel had wrongly advised Sundstrand officials that it was legally obligated to do so under the January 9 agreement with Huarisa.[35]" The original text of footnote 35 was expanded by the May 18, 1977 Order of the Court of Appeals and reads in its entirety as follows:]

> See Tr. 131, 165-167, 484-487, 625-631, 1703-1705, 2022-2023, 2420-2423, 2516-2519, 2620-2622, 2624-2627, 2635-2638 and the following depositions: Ethington 559, 565-571, 573-574, Olson 34-38, 40, 68-69, Huarisa 229-230, Pitte 96-97, 116-117, 167-168, 171-173, 180-181 and Schuette 304-305, 306-313. As we learned at oral argument, no formal written opinion was submitted by Sundstrand's counsel as to whether Sundstrand was or was not obligated to make further payments on February 6 (Sun-Huarisa Exhibit 52). Some of these references are to the original transcripts of depositions that were included in the record on appeal without objection. Sundstrand has referred to such materials (Br. 77 and Pet. 10), and other courts of appeals have also referred to deposition transcripts which were in the record on appeal but not in the trial record. *E.g., Lyon* v. *Carey,* 533 F.2d 649, 652 (D.C. Cir. 1976); *Merola* v. *Atlantic Richfield Co.,* 515 F.2d 165, 170 (3d Cir. 1975); see also *Barrett* v. *Baylor,* 457 F.2d 119, 124 n. 2 (7th Cir. 1972).

II. STATUTE AND RULE

Section 10(b) of the Securities Exchange Act of 1934 15 U.S. § 78j(b)

It shall be unlawful for any person, directly or indirectly, by the use of any means of instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

• • •

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(b)

(b) Every contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation; Provided, (A) that no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed

pursuant to paragraph (2) or (3) of subsection (c) of section 15 of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 15 of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within 3 years after such violation.

Rule 10b-5
17 C.F.R. § 240.10b-5

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

III. TEXT OF MATERIAL IN THE TRIAL RECORD CITED IN FOOTNOTE 35 OF COURT OF APPEALS OPINION, AS AMENDED BY ORDER OF MAY 18, 1977

A. Glossary of Persons Referred to in the Record Citations Listed in Footnote 35 of the Court of Appeals Opinion or Contained in this Appendix

*Witnesses**

James W. Ethington: Vice-Chairman of the Board and Chief Financial Officer of Sundstrand Corporation.

John B. Huarisa: Defendant and Chairman of the Board of Standard Kollsman Industries.

Donald E. Miller: Former Comptroller of Sundstrand Corporation.

Bruce F. Olson: Chairman of the Board and Chief Executive Officer of Sundstrand Corporation.

Charles E. Pitte, Jr.: Partner, Schiff, Hardin, Waite, Dorschel & Britton law firm.

Ted L. Rose: Secretary and Comptroller of Sundstrand Corporation.

Carl L. Sadler: President and Chief Operations Officer of Sundstrand Corporation.

Louis H. Schuette: Chairman of the Board and Chairman of the Executive Committee of Sundstrand Corporation.

Attorneys

Paul E. Freehling: Counsel for defendants Sun Chemical Corporation and the Estate of John B. Huarisa.

Donald R. Harris: Counsel for defendant Henry W. Meers.

W. Donald McSweeney: Counsel for plaintiff Sundstrand Corporation.

William A. Montgomery: Counsel for plaintiff Sundstrand Corporation.

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* The positions designated are those that were held at the time of the testimony of the witness in question.

B. Citations in the Court's Original Footnote 35

Trial Transcript, p. 131 (James W. Ethington direct)

don't know what that is.

Mr. Dean Cameron from Schiff, Hardin came over and discussed the possibilities if Sundstrand bought those shares of stock.

I stated that Sundstrand would only be willing to buy these shares of stock if I thought a merger was going to take place.

At that time I asked Mr. Huarisa if the earnings projections that he had given us still looked good and he stated "Yes," both for 1968 and 1969 and I then said that I would call my office and see if they would be interested in buying this block of stock in order that we might proceed with the merger.

I called—

Q. Well, excuse me, if I might interrupt. Now, did that, did that occur in this meeting?

A. Yes, it did.

Q. Oh, okay. Go ahead.

A. The Pope, Ballard firm connected a line to me, and I don't know if anybody else was in the room or not, but I did call our Rockford office and I talked to Mr. Olson and Mr. Schuette and Mr. Sadler on the telephone and told them that this—

THE COURT: Well, not the conversation.

MR. MC SWEENEY: No, no.

Trial Transcript, pp. 165-167 (James W. Ethington direct)

801(d)(1)(a), statements inconsistent with his testimony. I will have to go back and check.

THE COURT: I will take a look at it.

MR. MC SWEENEY: It was not with respect to 801 (d)(b) which we are talking about.

THE COURT: Well, I would prefer to take a look at it myself.

MR. MC SWEENEY: Sure. Yes, sir.

THE COURT: All right. Let's go on.

MR. MC SWEENEY: All right.

BY MR. MC SWEENEY:

Q. Now, after this meeting about which you have testified at the conclusion yesterday, which was on or about January 23, 1969, when did you next have, if you did, any contact with anyone representing SKI concerning this entire matter?

A. Some time around the 9th or 10th of February in 1969.

Q. And where did that—was that a person-to-person meeting?

A. I made a telephone call to Mr. Huarisa asking if I could have a meeting with him and with Mr. Pitte, who is our legal counsel from Schiff, Hardin, and Mr. Huarisa stated that he would be glad to meet with me and we made a date at the Chicago Club, I believe, for February 10th, 1969.

Q. All right, sir. Who was present at that meeting—you made a date and then you had the meeting, is that right?

A. Yes.

Q. All right. Fine. Who was present?

A. Mr. Huarisa was present and Mr. Pitte and myself.

Q. And what was said by those present at that meeting, sir?

MR. HARRIS: Your Honor, I would object to that question as calling for hearsay as to Mr. Meers. I think that that is not quite in the category of the type of hearsay evidence which the Court admitted conditionally.

THE COURT: Well, if there is a so-called conspiracy and the conspiracy is still in existence—I will show your objection and I will conditionally admit it on the same basis that I have been admitting the other evidence, but I will show your objection.

MR. HARRIS: Thank you, your Honor.

THE COURT: Go ahead.

BY MR. MC SWEENEY:

Q. The Court said you may answer.

THE COURT: You may answer.

THE WITNESS: Thank you.

BY THE WITNESS:

A. I asked—I told Mr. Huarisa that the purpose of my being there was to find out what was being done on Standard Kollsman merging into another company.

I also stated to him that Sundstrand would cooperate in any merger that he might come up with.

I also stated to him that I was concerned about the disposing of the Sundstrand—of the Standard Kollsman stock that we had in our possession.

Mr. Huarisa stated that he was working on a number of acquisitions and that Mr. Meers was also working on a number and that he would be glad to guarantee an amount of money that would take Sundstrand out of this.

Mr. Pitte then said that he would draw up a document and summarize our conversation and send it to Mr. Huarisa's lawyer at Pope, Ballard.

Q. Is there anything more of that meeting that you recall, sir?

A. I can't recall anything right at this minute.

Q. All right.

Now, I show you a document which has been marked Plaintiff's Exhibit 5, purporting to be a letter, or a copy of a

Trial Transcript, pp. 484-487

(Carl L. Sadler cross-examination)

going to go ahead with the purchase of the Burke stock?" Do you remember that?

MR. MONTGOMERY: Your Honor, I object. There has been no time fixed as to when Mr. Sadler came back from vacation.

THE COURT: Well, he can ask him if he ever asked them. Then he can fix the time.

Was that question ever asked: "What are you going to do about it?"

MR. FREEHLING: All right.

BY MR. FREEHLING:

Q. Mr. Sadler, did you ever ask Mr. Ethington: "Are you going to go ahead and purchase the Burke stock?"

A. I would presume I probably asked him that some time or other.

Q. That was in early February 1969, was it not?

A. I am sorry. I don't know. If you have got something there that says so, why, that is fine, but I don't know at this moment. I don't remember is all I am saying.

THE COURT: Was it in February? Was it in February sometime?

THE WITNESS: I am sorry, your Honor, I don't remember the conversation. I am not saying it didn't happen. I just don't remember now.

BY MR. FREEHLING:

Q. At least it was after January 20, 1969, isn't that right?

MR. MONTGOMERY: Then I do object on the ground that this is beyond the scope of the direct examination.

THE COURT: Overruled.

BY THE WITNESS:

A. Well, if you can refresh my memory in some way, I will be glad to—

THE COURT: Well, can you place it as to whether it was after you decided not to go through with the merger? Can't you place it by that?

THE WITNESS: Would you like me to tell you what I know of the subject?

THE COURT: No.

THE WITNESS: I am sorry.

THE COURT: I think counsel is entitled to an answer.

THE WITNESS: Oh, all right.

THE COURT: As to when the conversation took place.

THE WITNESS: Well, your Honor, all I am trying to say is this particular conversation has escaped me. If somebody will refresh my memory, I will be glad to corroborate it, but right now, I just plain don't remember the subject. I am sure that at some time I was curious about whether we had a continuing legal obligation to buy the Burke stock. It might very well be that after January 20th, I may have asked Ethington if he thought that we had such an obligation, but my memory right now, I would be saying something I don't know if I said, "Yes, I did."

BY MR. FREEHLING:

Q. What did Mr. Ethington respond to you?

A. I am sorry. I don't know right now. Perhaps you can refresh my memory but I don't remember the conversation at this moment.

Q. Mr. Ethington told you that legal counsel for Sundstrand said that Sundstrand was obligated to buy this stock, isn't that right?

A. Well, if that is in my deposition, I am sure it is right, or in my earlier trial testimony, because I told the truth, but I don't remember it now. That is all. I am sorry.

I will be happy to have you read the deposition or wherever it is.

Q. You told Mr. Ethington, "Fine, I hope you peddle it to somebody," isn't that right?

A. Again, I don't honestly remember the conversation. I presume it is right based on some deposition material you have or such. That is a long time ago. I have just forgotten it.

Q. Mr. Sadler, were you asked these questions and did you give these answers at your deposition?

MR. FREEHLING: Pages 142 and continuing on to Page 143.

BY MR. FREEHLING:

Q. After you had been asked about the meetings on January 20, you were asked this question, were you not, the following questions and gave the following answers:

> "Q. Did you have any conversation with Mr. Ethington after that meeting?
>
> "A. Yes.
>
> "Q. About the Burke stock?"

Then there was some colloquy between counsel and you answered:

> "A. Yes. I remember that some time shortly after I got back from skiing, the question came up about proceeding with the purchase of the Burke stock, and I said, 'Are you going to go ahead?' He said, 'Yes, as our counsel feels we are obligated to buy the stock.' I said, 'Fine. I hope you can peddle it at a good price to somebody.' That was the sum total of it."

Were you asked those questions and did you give those answers, Mr. Sadler?

A. If my deposition says so, I absolutely did.

THE COURT: What was the date of the deposition?

Trial Transcript, pp. 625-631
(Ted L. Ross cross-examination)

Q. Do you remember what you heard at the small meeting with Mr. Ethington and Mr. Schuette?

A. I believe Mr. Sadler made a statement to the effect that it was the opinion of the team that we should not proceed with the acquisition.

Q. So you didn't hear the rest of the discussion?

A. No, I can't recall that now.

Q. Yes. Now, you were present in court at the very end of Mr. Sadler's testimony last week, were you not?

A. Yes.

Q. You heard him say that after the events of January 20, 1969, he went on a skiing vacation, do you recall that?

A. I remember him talking about the skiing vacation. I don't remember the date. I'm sorry.

Q. Do you remember—I'm sorry.

A. I don't remember the dates that occurred.

Q. And do you remember that he testified that when he returned from the skiing vacation he asked Mr. Ethington whether Sundstrand planned to buy the Burke stock, do you recall that?

A. I recall that being said. I don't know whether he said it up here or you said it when you were reading from prior testimony.

Q. And Mr. Sadler said that Mr. Ethington had responded that Sundstrand did intend to buy that stock because legal counsel feels Sundstrand was obligated to buy the stock, do you recall that?

A. Again there is confusion about who said what during that testimony.

Q. And, of course, you will recall that Sundstrand made a cash payment of about $6,300,000 on February 6, 1969, in connection with the purchase of this stock, isn't that right?

A. I am aware of that, yes.

Q. Back in those days, in January and February, 1969, your title was secretary of the corporation, isn't that right?

A. Yes.

Q. And among your duties was liaisons with Sundstrand's legal counsel, isn't that true?

A. Yes.

Q. And in addition there was an in-house attorney, Mr. Schilling, who reported to you at that time, isn't that right?

A. Yes.

Q. Mr. Ross, the fact is that Sundstrand never sought or obtained any opinion of counsel to the effect that Sundstrand was obligated to make the $6,300,000 payment in connection with the Burke stock, isn't that so?

MR. MONTGOMERY: Objection, your Honor. Irrelevant and immaterial as to whether Sundstrand ever obtained a legal opinion with reference to an obligation—

THE COURT: Well, he may ask the question whether they did.

So far as you know, did they request or receive a legal opinion?

THE WITNESS: I, your Honor—I will remind Mr. Freehling that during the time period that this was occurring I was on the East Coast a great deal of the time and Mr. Ethington dealt with Mr. Pitte directly on this transaction. They were the ones that had the meeting. I was not involved in the transaction.

BY MR. FREEHLING:

Q. Mr. Ross, do you recall—

MR. FREEHLING: Excuse me a moment, your Honor.

THE COURT: Yes.

(Brief interruption.)

BY MR. FREEHLING:

Q. Mr. Ross, I show you what has been marked as Defendant Sun-Huarisa—

THE COURT: Well, if you have an interrogatory answer why don't you read it, I mean—

MR. FREEHLING: All right.

THE COURT: Did he sign the interrogatories?

MR. FREEHLING: Well, your Honor, if I may, I will—

THE COURT: Yes.

MR. FREEHLING: —I will show Mr. Ross the Defendant Sun-Huarisa Trial Exhibit 52, purporting to be answers to interrogatories, and I will ask him whether he signed them.

THE COURT: All right. Well, if he did, you may—all right, ask him.

BY THE WITNESS:

A. (Examining documents.) That's my signature on page 96.

BY MR. FREEHLING:

Q. In response to Interrogatory No. 1-A-1, "State Each Reason Why You Make Certain Contentions. State Whether One or More Opinions of Counsel have been Obtained with Respect to Such Obligation," and so on.

You gave the following answer, did you not—

MR. MONTGOMERY: Well, your Honor, I object again as irrelevant. Whether Sundstrand obtained an opinion of counsel with reference to this question is irrelevant and immaterial here.

MR. FREEHLING: May I respond, your Honor?

MR. MONTGOMERY: This is a case which is grounded on Rule 10b-5, it does not have anything to do with a legal obligation to purchase stock.

THE COURT: Well, the question—I assume that one question involved in this case is why Sundstrand decided to proceed with the stock purchase, whether they proceeded on the basis of the representations, whether they proceeded because they thought that they had a legal obligation and had no choice except to proceed, I assume that that is—

MR. FREEHLING: That is right, your Honor, and there is a second reason: Mr. Ethington apparently told Mr. Sadler that the reason for proceeding was that there was a legal opinion.

THE COURT: Well, you may—

MR. FREEHLING: Sundstrand has stated under oath and Mr. Ross has stated under oath there was no such legal opinion. I think that goes to Mr. Ethington's credibility.

THE COURT: Well, you may proceed. I don't know what it will prove one way or the other, but go ahead.

What is the answer?

BY MR. FREEHLING:

Q. The question was, basically, whether you had obtained a legal opinion with respect to the obligation to make the $6,300,000 payment, whether you had an obligation, and, if so, on what you based that contention.

And the answer was:

> "The agreement so provides. Sundstrand relies on all the language of the agreement."

I am reading from page 5 of the answer to Interrogatory 1-A-1.

(Reading continued:)

"In addition, at the time of such sale, transfer and conveyance and at the time of such payment Sundstrand did not have knowledge that the conduct of defendant in connection with Sundstrand's purchase of SKI stock gave rise to the claim asserted by Sundstrand in this action. No opinion of counsel has been obtained with respect to such obligation."

MR. MONTGOMERY: Your Honor, I request that the balance of that answer to that interrogatory be read.

MR. FREEHLING: I will be very happy to read it.

THE COURT: Read the rest of it.

BY MR. FREEHLING:

Q. (Reading continued:)

"Counsel for Sundstrand, Schiff, Hardin, Waite, Dorschel & Britton, who have participated in various aspects of the stock purchase transaction and represent Sundstrand in this action, did not render any opinion to Sundstrand that the agreement did not obligate it to make such payment at the time such payment was made."

Did you give that answer, sign that answer—or sign the answers to the interrogatories that include that answer?

A. You have the document there. I am sure that it indicates—

THE COURT: Well, there is no question about it. Let's go on.

MR. FREEHLING: All right.

BY MR. FREEHLING:

Q. All right. Now, Mr. Ross, you attended the 1969 Standard Kollsman meeting, the annual meeting of shareholders, did you not?

A. Yes.

Q. You accompanied Mr. Ethington to that meeting, did you not?

A. Yes.

Q. And at that meeting Sundstrand voted all 223,000-some-odd shares of its Standard Kollsman stock, isn't that so?

A. Yes.

Trial Transcript, pp. 1703-1705 (Statements of Counsel)

THE COURT: Well, I will hear from Sun Chemical.

MR. HARRIS: Your Honor, since we did two things at once a little faster than I was planning on, may I hand up a 41(b) motion?

THE COURT: You may present it. Yes, you may.

MR. FREEHLING: Your Honor, I am sure it comes as no surprise that the two defendants I represent also have a 41(b) motion which I serve.

THE COURT: No.

MR. FREEHLING: Your Honor, I will be very brief. I would like to avoid repeating what Mr. Harris has said, but at the same time, I would like to speak to the motion.

Your Honor, I would like to speak in particular to two of the questions that your Honor asked yesterday. One of them actually was addressed to the plaintiff: Why did Sundstrand complete the purchase of the stock after having turned down the merger? The second question, which was the one directed at my clients: namely, explain the disparity between events in the fall of 1968 and the results of the audit in the spring of 1969.

As I say, your Honor, I am going to be very brief unless your Honor asks me to expand.

As to why Sundstrand bought that stock, we know that Sundstrand on acquisitions as small as a million dollars, which is less than 15 per cent of the size of the purchase of the Burke stock, made exhaustive examinations before committing themselves. We know that Sundstrand made an exhaustive examination of Standard Kollsman in connection with the planned merger. We know that it was on February 6 after the exhaustive examination was over that Sundstrand for the first time paid anything or did anything in connection with this acquisition of stock.

The agreement in our view committed Sundstrand to do absolutely nothing until February 6th, but whether it did or—I am sorry. It committed Sundstrand to do absolutely nothing except to reimburse Huarisa for the first $335,000 payment.

On February 6, Sundstrand had done nothing. They had not reimbursed Huarisa, they hadn't paid nothing to the Burkes.

It was at that moment, February 6, that their conduct has to be viewed. It is at that time that Sundstrand had a complete view of Standard Kollsman, a view, as Mr. Ethington told us, that had let them to call off the merger proposal basically because they had no confidence in the earnings projections of Standard Kollsman, basically because they were convinced that over $4 million of assets on the books of Standard Kollsman would not be recoverable and would have to be written off.

Your Honor, the results, as bad as they were at year-end 1968, weren't that bad. Sundstrand saw things at Standard Kollsman as being in a worse light than even Price Waterhouse.

I submit, your Honor, that what has to be viewed here in terms of so-called reliance by Sundstrand is their knowledge as of February 6th, first, because that is the first time they paid anything or did anything and, secondly, because they in fact weren't obligated to do anything at all until that date.

Now, I don't want to repeat myself and I don't want to repeat Mr. Harris. I do want to bring to your Honor's attention one matter.

THE COURT: When you talk about that date, let's go back a little ways. You are saying in effect they could have rescinded the transaction and minimized their damages perhaps, but they still were going to get caught to the extent of what, $300,000 or $400,000. What you are in effect saying to me is they at that time, if they had been misled, they shouldn't have plunged in any deeper.

Doesn't that go to the question as to the amount of damages rather than the question whether damages should be assessed?

Trial Transcript, pp. 2022-2023 (Remarks of the Court)

make a move, I think what you better do is to consider it on the basis that, well, here it is, and tender it to the plaintiffs, and they can say yes or no or they can give you some other quick response. The whole thing, you can solve it one way or the other if you are going to solve it over the weekend, it seems to me. If you come back in and tell me at 10:30 on Monday morning that you have settled it, I will be pleased. If you tell me you can't settle it, I won't be as pleased but, at the same time, we will finish up the case and then I will go to work on it.

Let me say so far as the plaintiffs are concerned, I don't profess to have my mind made up in this case. I certainly

am not going to make up my mind until the conclusion of the case, and I am not going to make up my mind then. I am going to get briefs and I am going to study it further. I have got to read some depositions. I am in no position to make a decision.

I think there are some problems in this case both ways. I have said it is a case that I thought ought to be settled. I say it because I certainly think there are some problems so far as the defense is concerned.

On the other hand, I don't think the plaintiff has an entirely open field running to early victory or something like that. There are elements besides the mere fact of the making of representations. This case has some unique features.

One unique feature is that the company turned down the merger and then proceeded to go ahead and buy the stock. I haven't made a definite conclusion as to whether or not the company was really obligated to buy it when it bought it or not, but that certainly is an arguable question as to whether you were obligated or not obligated.

I don't think you will find many cases like this. If the merger was turned down, the usual procedure would be to turn down the whole business if you could.

Now, I don't know what effect that may have on the final outcome but that certainly is an element that the plaintiff ought to consider. There ought to be some flexibility based on factors such as that. If you had just a merger case here, my life would be a lot simpler, but you haven't got that. You turned away from that and you turned away from it after making some investigation, a pretty complete investigation.

But there is a whole raft of arguments that somebody is going to have to make a decision about. I don't know. When a case is tried before a judge, I

Trial Transcript, pp. 2420-2423 (Statements of Counsel)

MR. MC SWEENEY: Well, our position is that, first, we had a contract in which we would have been liable for the entire amount.

THE COURT: Well, tell me what provision—what is the provision in the contract that requires you to complete the purchase?

MR. MC SWEENEY: All right.

THE COURT: Do you want to refer to that?

MR. MC SWEENEY: Paragraph 1.

THE COURT: What does it say?

MR. MC SWEENEY: That Huarisa sells, conveys to us.

THE COURT: Yes, and what do you agree?

MR. MC SWEENEY: Subject to the payment of the unpaid balance of $6 million.

THE COURT: Well, do you agree to pay it?

MR. MC SWEENEY: We hadn't paid it by then but we were bound to pay it.

THE COURT: Under what language?

MR. MC SWEENEY: We rely on the entire agreement, specifically Paragraph 1.

He came forward with the stock, the 223,000 shares.

THE COURT: Well, actually you consummated the deal. My question is, were you obligated to consummate the deal?

MR. MC SWEENEY: Our position is we were obligated to consummate the deal.

THE COURT: All right.

MR. MC SWEENEY: Certainly, alternatively, we would have been liable for the $335,000 he had paid out for whatever consequential damages occurred as a result.

THE COURT: Well, I don't have any problem about getting your money back.

MR. MC SWEENEY: We were subject to whatever damages it would cause us as a company and our reputation for not going through with the contract.

Your Honor, the additional factor is we did not have to have a legal obligation to buy the stock.

THE COURT: Well, tell me about that.

MR. MC SWEENEY: Well, we had what we thought at least was a legal obligation and a moral obligation. Since we did not know of the fraud, even though we didn't want to go into a $100 million merger for many reasons, we still could buy the stock whether or not we were legally obligated.

Now, I submit if we had known then in February and March what we knew after a year or two of discovery in this case, we would not have done it. But whether or not we had a legal obligation even, we were entitled to buy the stock because we didn't know of the true condition of the company.

We knew enough to know that we didn't want a merger and involve our company with theirs for the various reasons that were given, those three reasons, but even if your Honor should decide there wasn't a legal obligation to go forward, there was no legal obligation on us to stop.

Moreover, as we have put in our case at length, the misrepresentations to us continued even after January 9th.

THE COURT: I understand that. On that point, perhaps Mr. Montgomery can answer this question. I think he handled most of this in putting in proofs in this case.

What I would like to focus on at this point is what were the particular facts in the Burke and the Ernst reports that if they had been called to the attention of Sundstrand prior to the Huarisa deal, they would have discouraged the making of any deal? The particular facts in the Burke and Ernst reports that would have in effect queered the whole deal right at that point.

MR. MONTGOMERY: Well, first of all, your Honor, the existence of the controversy and the existence of the communications by Burke and those in the Ernst & Ernst letter to the board of directors by and at the instigation of a member of the board of directors and major stockholder of the company is in itself a material fact that should have been disclosed and would have made a difference in this transaction. In fact, in their entirety—that is to say, without taking the particular contentions that Mr. Burke or Ernst & Ernst advanced in these documents—

THE COURT: They should have said, "We have got a dissident stockholder and we have been having some trouble with him for about six months, and he has gone to the SEC, and we have had some problems with him but we think he is clear off base and we have got the matter settled" or something?

Trial Transcript, pp. 2516-2519 (Statements of Counsel)

The record shows further there was a third meeting on January 20, and I am talking about before they start talking to Standard Kollsman. Now, this is strictly in Rockford, Illinois.

Ethington and Schuette discussed how to handle this problem they were now faced with, namely, the team's recommendation that the merger should be called off, and Ethington and Schuette's conclusion was that the merger should be called off. They had their third discussion. And, again, the earnings problem, the writeoff problem, the pre-production costs problem, was discussed.

Finally, then, as your Honor will recall, there was an evening meeting on January 20 and again the three factors were laid out, followed by another meeting on January 22 when once again the three factors were laid out.

Now, those matters, your Honor, that I have just been discussing are facts which Sundstrand learned after January 6th when the meeting was held at Pope, Ballard that led up to the January 9th agreement, but before February 6th when Sundstrand made its $6 million-plus investment. So, that is Item No. 1 with a big asterisk next to it as to what Sundstrand knew on February 6th that they did not know on January 9th.

THE COURT: They knew enough that they didn't want to go through a merger but they apparently didn't know enough to convince them that they didn't want to buy the stock.

MR. FREEHLING: Well, your Honor, I would remind your Honor of another thing that happened between January 9 and February 6th, or really two things that happened: Mr. Ethington and Mr. Sadler, two of the top officers of the company, had dumped their own stock. They did it before—their own Standard Kollsman stock—they did that before the merger was called off. So, they had apparently learned something between the time that they bought and the time that they sold that made them think that the stock wasn't a very good investment.

THE COURT: But let me ask this question: Even though there was no legal obligation, perhaps, to purchase this stock, I mean, if I reach that conclusion, I suppose that the argument can be made that insofar as Sundstrand was concerned, they had made a deal, in effect had made a deal —at the time that they made it they thought that they were going to go through with it, and they had made a deal with Huarisa, and I recall reading something in the testimony to the effect that at that time, at the time that the merger was being called off, he assured Huarisa that they would go through with it. So, they apparently felt some kind of, perhaps some kind of an obligation.

Now, why in the world would they be selling their own stock and then keeping $6 million worth of stock for their company? I mean, how would you explain something like that?

MR. FREEHLING: Well, your Honor—

THE COURT: I mean, are you saying that they were worried about the situation to the point where they got rid of a few shares of stock and then took $6 million worth and put it in their company—they were going to get hurt by that, weren't they, if it was bad stock?

MR. FREEHLING: Your Honor, unfortunately I don't believe that we know why Sundstrand went ahead and invested the $6 million. We know that they did it but we don't know why.

I could surmise, if your Honor would want me to, but it won't be based on anything in the record.

Obviously, Mr. Ethington felt personal discomfort at holding Standard Kollsman's shares in the second week of January in 1969 but he didn't feel personal discomfort, or

even corporate discomfort, about buying stock in the first week of February 1969. But as to why he felt the discomfort on the one hand the comfort on the other, I can only speculate because there is nothing in the record.

I think that what he believed in February was that somebody was going to merge with Standard Kollsman; if it wasn't Sundstrand it was going to be Sun Chemical or Riker Video, or maybe some company whose name had not yet surfaced, but somebody was going to merge, and that he would probably, that is, Sundstrand, would probably get out of this investment without a loss, but that's something we don't know. That's something that is not in the record.

THE COURT: You think that the effect of any misrepresentations that may have been made or any omissions that may have been omitted more or less had all worn off by that time, I mean, by the time that they decided not to go through with the merger? I mean, they were told a lot of things during the course of the meetings with Huarisa and some material that they wanted to get they were not able to get, isn't that true?

I mean, some of the—

MR. FREEHLING: Oh, no, your Honor, I think on the contrary.

THE COURT: I mean, some of the—what is it, the KIC material?

MR. FREEHLING: I'm sorry?

THE COURT: KIC—what is "KIC"?

MR. FREEHLING: Kollsman Instrument Corporation.

THE COURT: Well, I mean, not KIC, the Avionic material.

MR. FREEHLING: Your Honor, I think that the record establishes that anything and everything that Sundstrand asked for they received.

Trial Transcript, pp. 2620-2622 (Statements of Counsel)

to do with a merger that was never consummated. What you are trying to hold him for is a sale that he didn't even know was going to take place until a day or so before it happened.

MR. MONTGOMERY: That is true, your Honor, but it is irrelevant to this case. As the Court has said, we could have gone out and bought it in the open market for that matter.

You know, it was entirely reasonable that our having shown in interest in this company, we might buy stock.

THE COURT: Let's get back--I think we better get down to some more basic—well, these are all basic, but I will let you address yourself to the question—

First of all, you better spend some time with me, if you want to—I have already indicated that I am at least presently of the view that there are two relevant dates to consider. You are going to in effect be presented with the problem of what position your client was in when he turned over or in effect paid that balance of $6,300,000.

At that time the picture was not the same picture that he had back in January. At that time, I mean, Sundstrand knew a whole lot that they didn't know at the time they got themselves involved in the deal.

I read that document over a half a dozen times and I can't find any legal obligation in the document. I think Sundstrand had decided they were through with the merger, they could have walked off from the whole deal. But they

decide ahead and purchase the rest of the stock and put up six million dollars. They are entitled to at least show me what representations or what affected them in making that purchase, whether it was just a business judgment or speculation or whether they were relying on some facts that they had received in connection with their investigation of the merger and still thought they had some good stock they were buying and went through with the deal on that basis. I can't find and I don't think I am going to find that they had any legal obligation.

THE COURT: They might have considered that they had a moral obligation but not a legal obligation to proceed with the purchase.

MR. MONTGOMERY: Well, your Honor, I can assure you that rightly or wrongly Sundstrand considered it had a legal obligation and it also considered that it had a moral obligation—

THE COURT: That doesn't help them if they thought they had a legal one, I mean, I think that they are in the same position that anyone would have been—I mean, as of that time; they got themselves involved, they had a decision to make. "Shall we go through with it?" And they apparently made the decision to go through with it. But so far as the fact that they were compelled to do it, I can't find that in the language of the agreement.

MR. MONTGOMERY: I don't think that's the issue, your Honor. I think this is a red herring in this case, whether they had a—I mean, you know, my position is that they had a legal obligation.

THE COURT: All right.

MR. MONTGOMERY: And I don't back off from that. But I don't think that's the pertinent question.

THE COURT: That doesn't decide the case, I will agree with that.

MR. MONTGOMERY: That is right. That's not a key question here, and it doesn't—it also doesn't then reduce it to the simplest question, "Well, you made an investment on January 9 and you made another investment on February 6th." That's not what we

Trial Transcript, pp. 2624-2627 (Statements of Counsel)

the agreement here is the voidance of deal. You know, they contend we didn't buy it from Huarisa because the money went to the Burkes.

THE COURT: I don't have any problem on that, I think you did buy it from Huarisa.

MR. MONTGOMERY: Okay. Well, we didn't know, if we didn't go through with the deal we didn't know what Huarisa might sue us for and we had made an agreement with Huarisa which we—we couldn't just back off with it, one we couldn't back off from, without having a harm to our reputation as a reputable business concern.

We had no knowledge that there had been any fraud practiced upon us. And another fact, it seems to me that is worthy of consideration by the Court is a matter that we had paid or committed, in effect paid, committed to pay, this $335,000 to Huarisa, which was, at a minimum, an impediment to our abandoning the transaction.

I refer the Court to a case which we had cited in the first trial. I don't think that it was cited in this brief, but it is Bershad vs. McDonough, 28 F.2d 693. It is a Seventh Circuit decision in 1970. It is a case under Section 16(b) not under 10b5.

But there was a very similar situation there in terms of the kind of transaction that was in question. And the Court said on Page 698:

> "The circumstances of the transactions clearly indicate that the stock was effectively transferred for all practical purposes long before the exercise of the option. The $350,000 binder ostensibly paid for the option represented over 14 per cent of the total purchase price of the stock. Granting the magnitude of the sale contemplated, the size of the initial commitment strongly suggests that it was not just a binder. The extent of that payment represented, if not the exercise of the option, a significant return to the abandonment of the contemplated sale."

So, I don't think that—

THE COURT: Well, I suppose that you have got that argument here, but the fact remains that so far as that, what started out to be an option, at least, as between the Burkes and whoever was exercising the option, nothing could have happened so far as the Burkes were concerned; they would have been—they would have had $334,000 but they would have kept the stock and you would have been out of the picture.

MR. MONTGOMERY: Well, we had our agreement with Huarisa.

THE COURT: I know it.

Well, then the question is, did Huarisa have you in a situation under the terms of that agreement where you were not complying with the agreement; you never agreed in that agreement with him that you were purchasing the stock, that you would purchase the stock. He was transferring it to you, subject to.

MR. MONTGOMERY: Well, your Honor, you know, it's easy, really, to evaluate the transaction now in those

terms, and I suppose you could have—you could have, maybe, a law school exercise on this, but we are really talking about—we are talking about the activities of parties who actually did this.

THE COURT: Well, as I said a while ago, they may have felt legally obligated, rightly or wrongly, but the fact is that they put the money up in February and I think that you are going to have to judge the transaction as to whether or not they were, in effect, defrauded in some one way or another on the basis of the conditions that existed at the time that they paid over the $6 million.

MR. MONTGOMERY: Well, one of the conditions that existed was that—

THE COURT: Let's take it from there.

MR. MONTGOMERY: One of the conditions that existed was this agreement—

THE COURT: Take it from there.

MR. MONTGOMERY:—and the very fact of this agreement was what they were relying on, one of the things, one of the many things that they were relying on at the time that they made the payment, and in the context of this case the agreement, at a minimum, is important from the point of view of their reliance, their belief that they had an obligation, legal, moral, personal to Mr. Huarisa, whatever, to go ahead and consummate this transaction.

You recall, your Honor mentioned this morning, Mr. Huarisa—or Mr. Ethington—said to Mr. Huarisa at the end of the January 22nd meeting, "We are going to honor our commitment."

Huarisa didn't say, "You don't have any commitment to me." He was told by Ethington then.

THE COURT: What was his interest at that time? I mean, Huarisa wasn't going to—he had lost the merger already.

MR. MONTGOMERY: Yes, he—

THE COURT: Do you think that he just wanted to get rid of the Burkes? Was that it?

MR. MONTGOMERY: He had an unfriendly merger partner in the wings if Sun Chemical got this stock and he had an investment of 172,000 shares in SKI, independent of the

Trial Transcript, pp. 2635-2638 (Statements of Counsel)

mate of 80 cents to $1.

THE COURT: Let me ask this question—I think that I know the answer without asking it, but, is there any place in any deposition or transcript or trial testimony where any explanation was made by Sundstrand as to why they determined to go ahead with the Huarisa deal after they decided that they were not going to go through with the merger? Is there any single word of testimony in the record that would show the reason for proceeding?

MR. MONTGOMERY: I don't recall any as such, your Honor, but there is testimony in the record that they thought that they had bought the stock on January 9th. There is testimony that the directors—

THE COURT: The word "commitment" is in there. Well, where is the testimony in the record that they thought that they had purchased it, the whole stock, on January 9th?

MR. MONTGOMERY: There is testimony of Mr. Schuette concerning the telephone conversation that Mr. Ethington had with the—

THE COURT: Well, at that time they thought that they had—at that time obviously they expected to go through with the deal.

MR. MONTGOMERY: That is right, but they were making the decision—they thought that they were making a decision at that time—

THE COURT: Well, they were certainly making the decision that they were going to acquire this, and—but the purpose of acquiring it was in connection with the merger.

MR. MONTGOMERY: No, but—that's true, your Honor, that's true, but what I was about to say was, Mr. Schuette testified that there was consideration given in that telephone conversation to what would happen in the event that the merger did not go through, and they evaluated this—

THE COURT: Well, you mean that Sundstrand did?

MR. MONTGOMERY: That is right. On January 6th in a telephone conversation between Mr. Ethington and Mr. Kennedy's office in Chicago and Mr. Schuette and Mr. Sadler, and I am not sure whether Mr. Olson was there, in Rockford—

THE COURT: Well, what did they say? What did they say in the event that it did not go through—

MR. MONTGOMERY: They evaluated the downside risk in the event that the merger did not go through and concluded that because, as I recall it—

THE COURT: Would you refer me to that.

MR. MONTGOMERY: Yes. Just a moment.

THE COURT: Give me the transcript on that.

(Brief interruption.)

THE COURT: Well, you can give me that later.

MR. MONTGOMERY: Okay.

THE COURT: You say they discussed it and it said—talked about the downside, and then what? What did they find out was—

MR. MONTGOMERY: Well, they decided, "Well, we will go ahead and buy the stock," because—

THE COURT: That was at what point? At what point was this?

MR. MONTGOMERY: That was in January.

THE COURT: Right at the beginning?

MR. MONTGOMERY: That was—that was in the beginning, that was on January 6th.

THE COURT: They were discussing the possibility that the merger wouldn't go through.

MR. MONTGOMERY: That is right.

THE COURT: But had they already obligated themselves at that time to buy?

MR. MONTGOMERY: They were in the process of making the decision that they would buy it. They had not yet obligated themselves to buy it. This was a discussion concerning whether they would obligate—whether they would make that decision.

What I am saying is, it is proof of their understanding of what they were doing because they did decide to do it and then they did it. It is proof of their understanding.

It is not, as counsel suggests, a matter of Sundstrand just—a matter of why did Sundstrand do it.

As far as Sundstrand was concerned, they bought the stock on January 9th. Now, I appreciate your Honor may

have a different view as to whether they had a legal obligation to pay on February 6th but I think that the real live people who were doing this are important to consider and I think that in the context of this case more important to consider.

Deposition of John B. Huarisa, pp. 229-230

Q. Well, going back to your meeting on January 22, 1969, did Mr. Meers say anything about the write-offs?

A. No.

Q. As far as you know, he didn't say anything about anything at that meeting?

A. Well, I am sure he voiced some opinion, but I don't recall on any specific subject.

Q. Well, what was the final outcome of the meeting?

A. The final outcome of the meeting is that we would like to call it off.

Q. And that was agreed to, was it?

A. That was agreed to.

Q. And nothing was said at this meeting about the matter of the purchase of the shares of stock which were or had been owned by the Burke family?

A. As I remember, I don't know the exact words, but when the meeting broke up Mr. Ethington turned to me and said, "John, we are going to honor our commitment." Just as simple as that, and he also stated that he was going to return all the documents that he received from us.

Q. Okay, anything else?

A. And we would work out a joint announcement.

Q. I see; and did you do that?

A. Yes.

Q. Right then did you work it out?

A. No, I think it was worked out the next day.

Q. All right; anything else said at the meeting or subsequent to the meeting on January 22nd?

A. Not that I can remember.

Q. What did you say when Mr. Ethington said to you he was going to honor his agreement?

A. I didn't say anything.

Q. All right.

Now, after January 22nd, when was the next time you had anything to do with the—had any discussion with anyone concerning the Sundstrand matter?

A. Well, we probably discussed it with a lot of people in our organization, what was the cause, what was the—but nothing that I can say specific.

Q. When was the next time you had a meeting or a conversation with any representative of Sundstrand?

A. I had a luncheon date with Mr. Ethington and

Sun-Huarisa Exhibit 52: Plaintiff's Answers to First Set of Interrogatories of Defendants Standard Kollsman Industries, Inc. and John B. Huarisa, Interrogatory No. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SUNDSTRAND CORPORATION, a Delaware corporation, *Plaintiff,* *vs.* STANDARD KOLLSMAN INDUSTRIES, INC., an Illinois corporation, JOHN B. HUARISA and HENRY W. MEERS, *Defendants.*	Civil Action No. 69 C 1660

PLAINTIFF'S ANSWERS TO FIRST SET OF INTERROGATORIES OF DEFENDANTS STANDARD KOLLSMAN INDUSTRIES, INC. AND JOHN B. HUARISA

Plaintiff, Sundstrand Corporation ("Sundstrand"), answers the First Set of Interrogatories of Defendants Standard Kollsman Industries, Inc ("SKI") and John B. Huarisa, as follows:

Where the answer to any of the following Interrogatories requires the identification of persons or documents, the identity of such persons, who are referred to only by surname in the text of the answer, is set forth in Exhibit A hereto, and the identity of such documents, which are referred to only by deposition exhibit number or other numerical identification in the text of the answer, is set forth in Exhibit B hereto.

Interrogatory No. 1

Referring to the allegations of paragraph 6 of the complaint, relating to (a) the agreement executed January 9, 1969, (b) the transfer of 5,686 shares of Sundstrand common stock, and (c) the payment of $6,360,915,

(a) State whether you contend that such agreement obligated Sundstrand to pay such $6,360,915 and/or to transfer such 5,686 shares of stock and, if so,

(i) State each reason why you so contend (including all language of such agreement on which you rely to support such contention), state whether one or more opinions of counsel have been obtained with respect to such obligation (if so, separately for each such opinion of counsel, state whether it was in writing—in which case identify it—or was verbal—in which case identify the person or persons who expressed it—, state the date, place and circumstances of its being expressed, and identify each person who was present when it was expressed);

(ii) State the last date or dates by which you contend Sundstrand was obligated to make any part or all of such payment of $6,360,915, state each reason why you so contend (including all language of such agreement on which you rely to support your contention), and, if one or more of such last dates for payment are later than the date Sundstrand did pay such sum, state each reason why payment was made earlier than the last date for making payment;

(b) State whether the payment of $6,360,915 was made by check or checks drawn by Sundstrand and, if so, separately for each such check,

(i) State its date, amount, and the name of each payee and each endorser;

(ii) Identify each person who gave instructions to one or more Sundstrand officers, directors or employees relating to drawing such check or checks and,

separately for each such person, state the date, place, and circumstances of such instructions being given, identify each person to whom they were given and each other person present, and identify each documents relating or pertaining, directly or indirectly, thereto.

Answer to Interrogatory No. 1.

(a) As to the payment of $6,360,915, yes. The 5,686 shares of stock were sold, transferred and conveyed to Huarisa by the terms of the Agreement (paragraph 2).

(i) The Agreement so provides; Sundstrand relies on all the language of the Agreement. In addition, at the time of such sale, transfer and conveyance, and at the time of such payment, Sundstrand did not have knowledge that the conduct of defendants in connection with Sundstrand's purchase of SKI stock gave rise to the claim asserted by Sundstrand in this action. No opinion of counsel has been obtained with respect to such obligation. Counsel for Sundstrand, Schiff Hardin Waite Dorschel & Britton, who have participated in various aspects of the stock purchase transaction and represent Sundstrand in this action, did not render any opinion to Sundstrand that the Agreement did not obligate it to make such payment at the time such payment was made.

(ii) The payment of $6,360,915 was made by Sundstrand in accordance with the terms of the Agreement. Sundstrand has no contention as to the last date or dates by which it was obligated to make any part or all of such payment.

(b) (i) The payment of $6,360,915 was made by a cashier's check drawn on the First National Bank of Chicago, a copy of a facsimile of which is attached hereto as Exhibit C.

(ii) On or about February 3, 4 or 5, 1969, in one or more telephone conversations between Pitte, who was in Chicago, and Ethington, who was in Rockford, Illi-

nois, Pitte related to Ethington instructions relating to the drawing of such check which he had received from Hart of Pope, Ballard, Kennedy, Shepard & Fowle, counsel for Huarisa. No other person was present on either side of the telephone conversation between Ethington and Pitte.

On or about February 5, 1969, in a conversation at the Sundstrand corporate offices in Rockford, Illinois, Ethington gave instructions to Swanson relating to the drawing of such check. No other person was present at that time. Documents related thereto are Defendants' Deposition Exhibit Nos. 122 and 122-A.

I, Ted L. Ross, being duly sworn upon oath, depose and say that I am Secretary of Sundstrand Corporation, plaintiff in this cause; that the foregoing answers to interrogatories have been prepared by me and by counsel for Sundstrand; that such answers are based in part upon my own personal knowledge, in part upon information assembled from Sundstrand's records, in part upon conversations between myself or counsel for Sundstrand with certain of its officers and employees, and in part upon the deposition testimony and exhibits and other documents in this cause; and that such answers are true and correct to the best of my knowledge, information and belief.

/s/ TED L. ROSS
Ted L. Ross

Subscribed and sworn to
before me this 30th day
of October, 1970.

/s/ JUDITH A. BARR
Notary Public

My Commission Expires Dec. 14, 1971

IV. CITATIONS ADDED TO FOOTNOTE 35 BY THE COURT'S ORDER OF MAY 18, 1977

Brief of Appellee Sundstrand Corporation (August 27, 1976), p. 77

stituting the violation of Rule 10b-5 (Mem.Op. 71-72, App. 173-74). Jacobs, *The Impact of Rule 10b-5* § 40.04, p. 2-79 (1974).

IV. DEFENDANTS' ARGUMENTS ON THE ISSUES OF DAMAGES AND INTEREST ARE WITHOUT MERIT

Although Sundstrand had sought judgment for a principal amount ranging from approximately $6,700,000 to $6,200,000, based on alternative theories of relief,* the District Court awarded damages in the principal amount of $4,434,786, representing the difference between the price paid by Sundstrand and the Court's determination of the actual value of the acquired stock, plus interest from February 6, 1969 (Mem.Op. 75-76, App. 177-78). Defendants make a shot-gun attack on the District Court's findings concerning damages and interest, but each shot misses the target.

A. Sundstrand's Recovery Is Not Limited to the Amount Paid on January 9, 1969 or the Amount Due on February 6, 1969

The initial argument made by all defendants, that at most defendants are liable for inducing Sundstrand's initial payment of $334,785 (Sun-Huarisa Br. 55-56; Meers Br. 71), is merely a restatement of their erroneous argument that plaintiff failed to prove causation (*see* Point II-D, *supra*, pp. 61-64). Meers also argues that, in any event, on February 6, 1969, only partial payment was due under any reading of

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* Sundstrand sought rescission of its purchase of SKI stock (for which it had paid $6,695,700) or, in the alternative, the difference between the price paid for the stock and the amount for which the stock could have been sold at the time of the merger of SKI into Sun Chemical, with an appropriate discount because the stock was restricted. *See* Plaintiff's Answers and Objections to First Set of Interrogatories of Defendants Sun Chemical Corporation and John B. Huarisa to Plaintiff Sundstrand Corporation, No. 1(d), Record No. 464.

Petition for Rehearing and Suggestion of Rehearing en Banc on Behalf of Appellee Sundstrand Corporation (March 29, 1977), p. 10

(Slip Op. 27-28 and n. 35), was in the face of the District Court's findings on causation and its repeated, explicit rejection of defendants' arguments. In so ruling, this Court both expressly relied upon material not in the trial record (*see* Part IV, *infra*) and failed to adhere to the requirements of Rule 52(a), Fed.R.Civ.P., that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

The District Court held that Sundstrand consummated the purchase on February 6, 1969 because it relied upon the misrepresentations and omissions made by the defendants.[8] The District Court also explicitly rejected the defendants' contention that by February 6, 1969, Sundstrand had knowledge of the omitted or misrepresented facts. Pertinent findings of the District Court include both those pertaining to defendants misrepresentations and omissions (Mem. Op. 29-61, App. 131-63) and the following findings:

> Though defendants Sun Chemical and Huarisa claim that Sundstrand had full access to all relevant sources of information during the survey [of SKI in January, 1969], such was not the case, particularly with

[8] The District Court did not conclude that Sundstrand "completed the transaction for investment purposes" (Slip Op. 27); it merely held that Sundstrand was entitled to "its rights as an investor." (Mem. Op. 28, App. 130) The motive for making a purchase of securities is irrelevant under Rule 10b-5; the issues are reliance and causation. In any event, this Court's statement that any District Court finding that Sundstrand was investing in SKI stock was *sua sponte* (Slip Op. 27) is incorrect. Both counsel for Sundstrand (Tr. 2421-23) and counsel for Sun and Huarisa (Tr. 2516-19) referred to this theory in argument. Moreover, notwithstanding the Court's assertion that Sundstrand advanced a causation theory "for the first time in this Court" (Slip Op. 27), plaintiff has for years consistently contended that "[d]efendants are liable to Sundstrand even if the stock purchase did not occur until February 6, 1969." (Plaintiff's Trial Brief, p. 94, filed September 10, 1975, Record No. 615(a))

respect to financial information. (Mem. Op 22, App. 124; Venner Dep. 18-20, 32-35; Katz Dep. 212-13; Nichinson Dep. 175-78, 252, 620-22; Ross Tr. 511-12, 537-38, 641-42)

* * *

. . . Between January 9 and the purchase of the 223,190 shares of SKI stock by Sundstrand on February 6, Sundstrand conducted an investigation of SKI, described above. This investigation, however, did not cure the previous misrepresentations and omissions. In fact,

V. ADDITIONAL REFERENCES TO THE TRIAL RECORD CITED IN PETITION OF SUNDSTRAND CORPORATION

Deposition of Louis H. Schuette, pp. 330-332

Q. Did Mr. Ethington in the period between January 6 and February 6 ever discuss with you whether the Standard Kollsman stock would be a good investment for Sundstrand?

MR. MONTGOMERY: Would you read that back?

(Question read by the reporter.)

MR. MONTGOMERY: Is this including the conversation of January 6?

MR. FREEHLING: Oh, we will exclude the conversation of January 6.

BY THE WITNESS:

Q. Yes. Generally I think I have already testified as to the price earnings ratio of people in the electronics industry and if the projected earnings were there what the stock would be worth. We were quite knowledgeable as a result of having negotiated with Mr. Meers, that there were a number of other companies interested in Standard Kollsman and we did not feel that it was too bad an investment if this was the situation.

Q. Did there come a time when you had some doubts about the ability of Standard Kollsman to project its earnings?

A. I sure did.

Q. And that was in mid to late January 1969?

A. That was our own assessment. The published information came out in March or April.

Q. Was there any discussion with Mr. Ethington after you reached the conclusion that you did not have the utmost confidence in Standard Kollsman's projections, but

prior to February 6 as to whether the Standard Kollsman stock would be a good investment?

A. I don't—repeat that question. I got lost in that one.

(Question read by the reporter.)

BY THE WITNESS:

A. Yes.

Q. What was said by you and what was said by Mr. Ethington in that conversation?

A. We again went through our same reasoning, that maybe we were wrong. We were not the greatest people in the world. Maybe he was right. Because he continued to emphasize even in the meeting of January 22nd that we were wrong and that he was right in what he had projected. And if he were right and if they had all of these other people that were potential merger partners, it must have been a good investment.

Q. A good investment for Sundstrand?

A. Yes.

Q. Was that a single conversation with Mr. Ethington?

A. No, that was a mutiple conversation.

Q. And all of those were after January 22nd but prior to February 6th, is that right?

A. Continuous discussion, yes. There were a number of them later.

Q. There were a number of those conversations between the period of January 22nd?

A. Between Mr. Ethington and I, yes. I have already testified to that three times.

Q. Did you discuss the subject of whether the Sundstrand stock—the Standard Kollsman stock would be a good investment for Sundstrand between the period January 22 and February 6 with anyone other than Mr. Ethington?

A. With Mr. Ross, yes.

Q. What did Mr. Ross say?

A. He was quite aware of our reasoning and he did concur in it.

Deposition of Louis H. Schuette, pp. 336-337

Q. Then we can take it that on February 6 you still believed it was a good investment, is that right?

A. That is right.

Q. Now did your decision sometime in January change? You still held on February 6 that the stock was a good investment for Sundstrand. Was that decision based in any way on the projection of 1968 earnings of Standard Kollsman?

MR. MONTGOMERY: You say decision. You are using the word "decision." I don't think he said he made a decision.

BY MR. FREEHLING:

Q. His opinion.

A. The opinion was based on our original discussion with Mr. Huarisa they had made 85 cents the third quarter. By the third quarter of 1968 Kollsman Instruments had turned into the black and they expected an increase in earnings for 1968. And their projections into 1969 on the basis of which we were to negotiate was originally stated as about $2.41. It was later modified to about $2.13 or $2.14, somewhere in there. So yes, it did have some influencing factor when these earnings came out.

Trial Transcript, pp. 749-752
(Donald E. Miller cross-examination)

Q. Now, Mr. Miller, about February 1, 1969, you first heard about Sundstrand purchasing some Standard Kollsman stock as opposed to merging with the whole company or acquiring the whole company, isn't that true?

A. Yes.

Q. You heard about it from a Mr. Isaacson, did you not?

A. Yes.

Q. Who was Mr. Isaacson?

A. Mr. Isaacson was in charge of the corporate accounting at Sundstrand at that time.

Q. And this conversation was shortly before Sundstrand paid 6,300,000-some-odd dollars, isn't that true?

A. True.

Q. And you had a conversation with Mr. Ethington about that purchase at the same time, at about the same time as your conversation with Mr. Isaacson, isn't that so?

A. Some time afterwards, yes.

Q. But before the money was paid, isn't that right?

A. I don't think so. It may have been.

Q. And you asked Mr. Ethington why Sundstrand would want to buy the Standard Kollsman stock after having decided not to acquire Standard Kollsman, isn't that right?

A. Yes.

Q. And Mr. Ethington explained to you that there was an agreement to buy shares of Standard Kollsman because Mr. Huarisa had a first call or option on the shares and

had been unable to come up with that much money, isn't that right?

A. Yes.

Q. And Mr. Ethington told you that he thought that the stock would be a good investment, even at $1.50 per share projected earnings for 1969, isn't that so?

A. Yes.

Q. He told you that he thought that this purchase, the purchase of this stock, would be a good investment because there were other people interested in merging with Standard Kollsman and because their projected earnings were considerably higher in 1969 than in 1968, isn't that so?

A. It sounds right.

THE COURT: Who was it who said that?

MR. FREEHLING: Sir?

THE COURT: Who was the other party to the conversation?

MR. FREEHLING: This was a conversation—

BY MR. FREEHLING:

Q. This was a conversation, was it not, Mr. Miller, between you and Mr. Ethington, the president of Sundstrand Corporation?

A. That is right.